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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1[redacted] 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. McALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, SAMUEL J. ABATE

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IN THE

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OCTOBER TERM, 1969

No. 1033

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER, SAMUEL J. ABATE

Opinions Below

The opinion of the Supreme Court of the State of New York at Special Term dated July 21, 1969, and modified on July 30, 1969 is set forth at length in the Appendix hereto, at pages A10 and A19.

The opinion of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department dated August 26, 1969, and the dissenting opinion, are reported at 33 A. D. 2d 660 and are set forth at length in the Appendix hereto, at pages A24 and A25.

The opinions of the Court of Appeals of the State of New York, dated October 8th, 1969, and the dissenting opinions are reported at 25 N. Y. 2d 309 and are set forth at length in the Appendix hereto, at pages A34 and A42.

Jurisdiction

The order of the Court of Appeals of the State of New York was rendered and entered on October 8th, 1969, a copy of which appears at length in the Appendix hereto, at page A31. The petition for a Writ of Certiorari was filed on January 5, 1970 and was granted on February 24, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

Constitutional Provisions Involved

The provision of the United States Constitution involved in the determination of this case is Amendment XIV, Section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or en-

force any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The questions presented are:

1. Is the multi-member district plan proposed by the Board of Supervisors of Rockland County constitutional?

2. Is the population deviation of 11.9 per cent between the highest and the lowest population per legislator consistent with the rulings of this Court in determining equal representation for equal numbers of people?

3. Has the Board of Supervisors of Rockland County made a good-faith effort to achieve precise mathematical equality as required by the rulings of this Court?

Statement of the Case

Rockland County is located in the New York City Metropolitan Area and is approximately 30 miles from New York City. Until a decade ago it was a small suburban county. In the middle 1950's Rockland County experienced the development of two major arterial highways that became the heartlines of the interstate highway systems in the metropolitan area. Consequently, from that time forward Rockland County experienced rapid, if not phenomenal growth. From its origins, Rockland County was governed by a five man Board of Supervisors, each respective Supervisor being elected by and representing one of the towns comprising the County, without regard to population.

In 1965, an action was commenced by a resident of Rockland County in the New York State Supreme Court for the purposes of compelling the Rockland County Board of Supervisors to reapportion themselves in a manner more consistent with the then recent constitutional guidelines. The Rockland County Board of Supervisors removed that action to the United States District Court for the Southern District of New York. As a result, in May of 1966, the Rockland County Board of Supervisors was directed by the United States District Court for the Southern District of New York to reapportion themselves by submitting a proposed plan to the electorate at the forthcoming general election. That Court mandated that the plan submitted must be consistent with the "one-man, one-vote" doctrine (*Lodico* v. *Board of Supervisors of Rockland County,* 256 F. Supp. 442). The electorate of Rockland County rejected the plan of reapportionment offered.

After several years of minimal activity, and after several attempts to reapportion the County by way of referendum were rejected by the electorate, the instant proceeding was instituted in the New York State Supreme Court. This action sought, *inter alia,* to compel the Rockland County Board of Supervisors to place a plan of reapportionment on the ballot for the general election in November of 1968, since the said Rockland County Board of Supervisors did place for referendum a proposal to establish a County Charter form of Government on the ballot for that November. The Petitioner, Samuel J. Abate, asserted that reapportionment was more important than Charter, and further, that a Charter form of government would be ineffective without reapportionment. The Rockland County Board of Supervisors moved to dismiss that action alleging *res adjudicata,* and claiming

that the decision in the previous Federal action (*Lodico v. Board of Supervisors, supra*) indicated that the United States District Court for the Southern District of New York retained jurisdiction. Mr. Justice Joseph F. Gagliardi, a Justice of the New York State Supreme Court, stayed the State Court action pending clarification and determination as to Federal Court jurisdiction. On March 12, 1969, Mr. Justice Gagliardi issued a supplemental decision vacating the stay and denying the cross-motion. This supplemental decision was rendered in view of correspondence between Judge Croake of the United States District Court for the Southern District of New York and Mr. Justice Gagliardi. Thereafter, the Rockland County Board of Supervisors submitted a plan of weighted voting to the New York State Supreme Court for approval. The weighted voting plan was declared unconstitutional by order of Mr. Justice Hawkins of the New York State Supreme Court and the Board of Supervisors was directed to present the Court with a proposed plan of reapportionment "with all deliberate speed."

Subsequently, and on June 24, 1969, the Board of Supervisors, on recommendation of a reapportionment subcommittee of the Rockland County Charter Commission, adopted a resolution providing for a multi-member district plan of reapportionment, preserving unto the Town Supervisors the automatic right to serve on the County Legislature by reason of their election as a Town Supervisor. This resolution, entitled No. 311 of 1969 (A.1) was submitted to Mr. Justice Hawkins for approval. By decision dated July 21, 1969, and modified July 30, 1969 (A.10 and A.19) the Court implemented a modified form of the proposal presented in the said resolution. Specifically, Mr. Justice Hawkins eliminated the dual capacity

of the Town Supervisors and provided for 18 County Legislators, elected from multi-member districts.

All of the Plaintiffs appealed this decision to the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department. On August 26, 1969, the Appellate Division affirmed the lower court (A.24), the late Honorable George J. Beldock, Presiding Justice of the said Court dissenting (A.25). The late Mr. Justice Beldock in his dissent concerned himself with the recent pronouncements of the United States Supreme Court, and the fact that they have cast considerable doubt "upon the heretofore assumed validity of reapportionment plans which managed to achieve *de minimis* variations but which fell short of exact mathematical equality (A.27)

Mr. Justice Beldock clearly stated that he believed the plan to be unconstitutional, averring that it seemed clear that no attempt had been made to achieve mathematical equality.

This decision was appealed by all of the Plaintiffs to the Court of Appeals of the State of New York, who affirmed the opinion below (A.34). The Honorable Stanley H. Fuld, Chief Justice of the Court of Appeals and the Honorable Matthew J. Jasen, Associate Justice, dissented (A.42). In that dissent, Justices Fuld and Jasen stated that the plan proposed deprives the voters of equal protection of the laws.

All the Plaintiffs petitioned this Court for a Writ of Certiorari on January 5, 1970, which writ was granted by this Honorable Court on February 4, 1970.

Summary of Argument

The Petitioner, Samuel J. Abate, believes that the multi-member district plan of reapportionment as applied to Rockland County is unconstitutional under the "one man, one vote" principle. The existent multi-member district plan, based on the 1969 special census figures results in for a deviation of 11.9% between the highest and lowest population per legislator. Considering population trends in Rockland County, these deviations will continue to increase, and at some point, will far exceed the already substantial deviation figures. The deviation is far in excess of the minimal requirements established by this Court.

The respondent Board of Supervisors, when adopting the apportionment plan in question, allowed criteria other than population to prevail. The precedent is well established to the effect that the controlling criterion must be population, and from this all other considerations may be evaluated and integrated. The desperate attempt of the respondent Board of Supervisors to preserve what they refer to as the "traditional town-county relationship" must not be permitted to supersede constitutional mandates. In Rockland County one man's vote in District No. 5 (Orangetown) is worth 11.9% less than one man's vote in District No. 4 (Clarkstown). If one were to analyze population trends in Rockland County it would soon be evident that the disparity could soon increase.

The plan of reapportionment adopted does not approach the standard established by this Court.

ARGUMENT I

Rockland County's plan of reapportionment is violative of the constitutional requirements for equal representation.

In 1964, this Court declared the basic pronouncement in the area of reapportionment stating that "as nearly as is practicable" one man's vote should be worth as much as another man's vote (*Wesberry* v. *Sanders,* 376 U. S. 1, 1964). This doctrine has been extended by this Court to apply, in addition to Congressional Districts, to State Legislatures (*Reynolds* v. *Sims,* 377 U. S. 533, 1964), units of local Government (*Avery* v. *Midland County,* 390 U. S. 474, 1968), and even to School Districts (*Hadley* v. *The Junior College District of Metropolitan Kansas City, Mo.,* —— U. S. ——, 25 L. Ed. 2d 45, 1970). The The precedent is clear and unambiguous to the effect that "the proportions of the representatives and of the constituents (must) . . . remain invariably the same." (*Wesberry* v. *Sanders, supra* at page 17). This doctrine has been continually expounded and expanded.

Most recently this Honorable Court defined the "as nearly as is practicable" standard. It was held that,

> "Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the Command of Article I, §2, that States create . . . districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or

for which justification is shown." (*Kirkpatrick* v. *Preisler,* 394 U. S. 526, at page 530, 1969).

In attempting to clarify the position established, this Court further held that,

> ". . . to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the Constitutional command to provide equal representation for equal numbers of people. (N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." (*Reynolds* v. *Sims, supra,* at 579-580).
>
> ". . . The rule is one of 'practicability' rather than political 'practicality' . . . problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." (*Kirkpatrick* v. *Preisler, supra*).

In the instant proceeding, the Rockland County Board of Supervisors proposed a plan of reapportionment in which the percentage deviation between the highest population and the lowest population per legislator is 11.9 percent. This deviation far exceeds the minimal requirements established by this Court.

Under the existing plan there is no equality in representation. The Hon. Chief Justice Fuld, of the Court of Appeals, in his dissenting opinion, reduced the respondent Board of Supervisors' motives to their most fundamental element. Justice Fuld stated,

> "In the present case, population was neither 'the starting point' nor 'the controlling criterion.' It is

undisputed and indisputable that the board's sole consideration in fixing legislative districts was the preservation of existing town lines. It was only *after* the districts had been created and its lines fixed that any attempt was made to equalize the voting representation—an attempt which could not possibly succeed because of the nature of the plan." A46)

"Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race or economic status." (*Reynolds* v. *Sims, supra* at page 566).

The very foundation of reapportionment is built upon the theory that "[P]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment . . ." (*Reynolds* v. *Sims, supra* at page 567).

Accordingly, the basic tenet of reapportionment requires adherence to a formula of "as nearly is practicable" population equality. In the case at bar, a disparity of 11.9% is unacceptable, when, with a single member district plan that deviation can be reduced some 8.4%. Under circumstances such as these, the plan adopted cannot be declared to be a bona-fide attempt at reapportionment within constitutional guidelines.

The trends of Rockland County population have proven exceptional growth in certain of the towns of Rockland County, while others have remained fairly constant and without marked change. (See Appendix I.) Between the period of 1966 and 1969 the town based multi-member district numbered 1 (Stony Point) grew some 410 persons while district numbered III (Ramapo) grew some

14,425 persons. Accordingly, in order to achieve some logical and equitable plan of reapportionment in the future, these so called "minimal" population deviations will undoubtedly increase. To permit a multi-member district plan with an 11.9% disparity at this time will lead to greater disparities in the future. The population trends of Rockland County clearly indicate that multi-member districts based upon town boundaries cannot provide the electorate of Rockland County with equal representation under the law. By providing for a multi-member district plan with constant boundaries, a situation has been created whereby it is conceivable that one district could control the entire County Legislature. In point of particular fact, at the present time, District No. 3 controls one-third of the total number of votes that can be cast in the County Legislature. Since that town (District) has experienced the largest population growth and appears to be able, by way of underdeveloped land, to continue this rapid growth, that town (District) can possibly control a majority of the 18 votes on the Legislature. If that town (District) were to elect just one more legislator that town (District) could control the outcome of all votes concerning financial matters by the County Legislature, since twelve votes are required to adopt a financial question. The inherent defects of a multi-member district plan with constant boundaries are infinite.

The Honorable Stanley H. Fuld, Chief Justice of the Court of Appeals, in his dissenting opinion, stated that,

> "In fact, it is theoretically possible for a plan such as the one before us to result in deviations approaching 100%. And, since the plan rigidly fixes district lines—providing for no variation—there is no way to compensate for or minimize such extreme deviations." (A.47).

ARGUMENT II

The Rockland County Board of Supervisors has not made a good faith effort to achieve precise mathematical equality as required by the rulings of this Court.

The Board of Supervisors has maintained that the multi-member district plan proposed and adopted presents the most precise and mathematically equal plan while preserving the "traditional town-county boundary" concept. The 11.9% deviation makes this plan inherently deficient. The town boundary concept cannot stand as the sole basis for reapportionment.

The respondent Board of Supervisors have continually asserted that multi-member districts is the only workable reapportionment plan for Rockland County in order to maintain town lines with a minimal population deviation. It is submitted that the respondent Board of Supervisors have failed to consider any plan other than the one at bar, since this plan preserved for them the so-called traditional relationship. Interestingly enough, the thrust of each of the respondent's appeals throughout the state courts was to preserve unto themselves the ability of a Town Supervisor elect to automatically serve as a County Legislator, without standing for election to that office.

The respondents would have this honorable Court believe that all constitutional guarantees and mandates must be forsaken in order to preserve what they refer to as "the traditional town-county relationship." It is submitted that reapportionment for Rockland County must be held above created political expediencies, which in reality are attempts at self preservation.

The consideration of local convenience should not be deemed so meritorious as to overshadow constitutional guarantees. The late Mr. Justice Beldock; of the Appellate Division of the Supreme Court of the State of New York, in his dissent, clearly brought this issue to the forefront. He stated that,

> "This appeal, therefore, must be dealt with in terms of the justification offered for the variance. We should not content ourselves with the happenstance that the variance in this case is less than in some other case. Notwithstanding the long history of Rockland County's attempts to reapportion, and the particular problems that county faces, I believe that the variance has not been adequately justified. Indeed, defendants' argument on appeal makes little attempt at justification. The thrust of defendants' position on appeal (aside from arguing the abstract acceptability of a multi-member districting plan) is that the variance is *de minimis*. This argument is predicated on language in *Reynolds* and *Swann* cases to the effect that *de minimis* variances will be accepted provided that a rational state policy underlies the basis for the variances. It seems to me, though, that the *Wells* and *Kirkpatrick* cases provide the guidelines for determining rationality. In justification of the variance, the defendants lay stress on the plan's use of existing town lines. This reasoning, however, was rejected by the Court in *Wells* v. *Rockefeller, Supra,* . . .
>
> "In sum, it seems clear that no attempt has been made to achieve a mathematical balance within the standards set forth by the Supreme Court. The plan at bar merely seeks to achieve the best apportionment against the preconceived notion that

the towns must stay intact—a notion which has been rejected by the Supreme Court in its latest pronouncements." (A28, A29, A30)

CONCLUSION

The plan of apportionment proposed and adopted for Rockland County does not meet constitutional "muster". This Honorable Court has consistently held that when an office is to be filled by the electorate, in any level of government, there is no way in which the constitutional requirements of "equality of voting power" can be avoided. (*Hadley* v. *Junior College District of Metropolitan, Kansas City, Missouri, Supra*). These consistent rulings have clearly indicated the manner and methods by which "equality of voting power" can be achieved.

In Rockland County the established criteria were suppressed in order to allow the so-called "traditional town-county relationship" to become an integral part of reapportionment. If this consideration were reduced to its very basic element, it would be obvious that it was simply an attempt at self preservation by the then Supervisors elect. This point comes to sharper focus when one considers that the original plan contained a provision permitting the Town Supervisors elect to serve on the county legislature, *ex officio,* and without standing for election to the county legislature.

The *modus operendi* of the Respondent Board of Supervisors to design a plan preserving unto themselves longevity, while making some attempt at appearing to reapportion upon constitutional guidelines, resulted in an 11.9% deviation between the highest and lowest population per legislator. If this were a plan of reapportionment for a congressional district it would not be deemed

acceptable by this Court. Why, then, should it be acceptable for Rockland County?

This Honorable Court, through a series of pronouncements has held that the same precise standards apply to all units of Government. In the most recent decision this Court stated, that,

> "As we said before, '[v]iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the constitution to prevent experimentation.' Sailors v. Board of Education, 387 U.S. 105, at page 110-111. But once a state has decided to use the process of popular election and 'once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.' Gray v. Sanders, 372 U.S. 368, at page 381." (Hadley v. the Junior College District of Metropolitan Kansas City, Missouri, Supra, L. Ed. at page 52).

Respectfully submitted,

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Samuel J. Abate

APPENDIX 1

Population Table

Town	*1950*	*1957*	*1960*	*1963*	*1966*	*1969*
Stony Point	5,485	8,132	8,739	10,316	11,704	12,1[illegible]
Haverstraw	12,979	15,073	16,632	17,538	20,659	23,6[illegible]
Orangetown	34,554	39,034	43,172	47,051	49,852	52,0[illegible]
Clarkstown	15,674	24,280	33,196	42,749	51,883	57,8[illegible]
Ramapo	20,584	27,264	35,064	44,375	58,626	73,6[illegible]